88-1004

Supreme Court, U.S.
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DEC 9 1988
JOSEPH F. SPANIOL, JR.
CLERK

SUPREME COURT OF THE UNITED STATES

NO. _____

IN THE MATTER OF: CAMBRIDGE PROPERTIES, INC.

Debtor

CAMBRIDGE PROPERTIES, INC.,

Petitioner

=versus=

BATON ROUGE PRODUCTION CREDIT ASSOCIATION,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Appeal From The United States Court
Of Appeal, Fifth Circuit, No. 88-3133
And From The United States District Court
For The Eastern District Of Louisiana
(CA-87-4154-E (4)

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 88-3133
Summary Calendar

IN THE MATTER OF: CAMBRIDGE PROPERTIES, INC.

Debtor

CAMBRIDGE PROPERTIES, INC.,

Apellant,

versus

BATON ROUGE PRODUCTION CREDIT ASSOC.,

Appellee.

Appeal from the United States District Court
for the Eastern District of Louisiana
(CA-87-4154-E (4))

(September 26, 1988)

Before CLARK, Chief Judge, Johnson, and JOLLY, Circuit Judges.

PER CURIAM:

Debtor Cambridge Properties, Inc. appeals a decision of the district court affirming an order of the bankruptcy court lifting

an automatic stay imposed pursuant to 11 U.S.C. Section 362. Finding no error in the bankruptcy court's order, we affirm.

I.

In January 1983, Geoffrey and Sara Longenecker executed a collateral mortgage note to creditor Baton Rouge Production Credit Association (Production Credit) in the amount of $500,000. The $500,000 note was secured by an act of collateral mortgage on a certain tract of immovable property in the Parish of St. Tammany, Louisiana. Thereafter, the Longeneckers transferred the St. Tammany property to Cambridge Properties. Subsequent to the above transfer, Cambridge filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code on August 19, 1985.

On November 21, 1985, approximately three months after Cambridge instituted proceedings under Chapter 11, Production Credit filed a motion to lift the automatic stay imposed by

virtue of Section 362. After several attempts by Cambridge and Production Credit to negotiate an agreement which would afford adequate protection to Production Credit, as well as several hearings on the matter, the bankruptcy court entered a joint plan of settlement and compromise on July 31, 1986 which included an agreement that Cambridge would furnish adequate protection to Production Credit in the form of monthly cash payments with such payments commencing on or prior to Septmeber 22, 1986. The order of the bankruptcy court further provided that, should Cambridge fail to comply with the conditions of adequate protection set forth in the order, the stay imposed under Section 362 would be automatically lifted upon presentation of an application and order for the lifting of the stay. Importantly, both Cambridge and Production Credit were present at the conference pursuant to which the above adequate protection agreement was entered.

Thereafter, Production Credit received payment from Cambridge on September 26, 1986, but did not receive further payment until May 20, 1987. The payment on May 20th apparently was the result of another conference on May 20, 1987 between the bankruptcy court and the parties wherein Cambridge agreed to continue to make payments to Production Credit on the twentieth day of each month. As a condition of the aforementioned agreement, the bankruptcy court provided that Cambridge's failure to make payment in compliance with the agreement would result in the automatic lifting of the stay without further notice or hearing.

Subsequently, Cambridge once again defaulte on its monthly payments to Production Credit. Accordingly, because of Cambridge's failure to m such payments and bacause of the substantial number of mortgages affecting the property mortgaged to Production Credit, the bankruptcy court lifted the automatic stay on July 31, 1987

Cambridge filed its notice of appeal on August 18, 1987.

II.

Initially, we address Production Credit's contention that we do not possess the requisite jurisdiction to entertain Cambridge's appeal. Bankruptcy Rule 8002(a) provides in pertinent part:

> The notice of appeal shall be filed with the Clerk of the Bankruptcy Court within 10 days of the date of entry of the judgment, order or decree appealed from.

In the instant case, the bankruptcy judge signed the order lifting the automatice stay on July 31, 1987. The record reflects that this order was entered on the docket sheet on August 4, 1987. Cambridge filed its notice of appeal on August 18, 1987. Production Credit contends that, since Cambridge did not file its notice of appeal within the requisite ten day perio- provided in Rule 8002(a), this Court does not possess jurisdiction of the instant cause.

However, the above argument of Production Credit is flawed due to the fact that the appellate timetable for Rule 8002(a) is not triggered until the "entry of the judgment, order or decree appealed from." "Entry" of the order occurs when the order is "set forth in a written document separate from the court's opinion ... and when the substance of this separate document is reflected in an appropriate notation on the docket sheet assigned to the action. . . ." Caperton v. Beatrice Pocahontas Coal Co., 585 F.2d 683,688 (4th Cir. 1978).

As noted previously, the July 31, 1987 order of the bankruptcy court was entered on the docket sheet on August 4, 1987. Pursuant to Bankruptcy Rule 9006(a), the day that the order appealed from is entered on the docket sheet, as well as intermediate Saturday and Sundays, are not included in computing the ten day periof for purposes of Rule 8002(a). Thus, Cambridge's notice of appeal, filed on August

18, 1987, was timely filed on the tenth day following the entry of the July 31, 987 order of the bankruptcy court; therefore, this Court properly has jurisdiction of the instant appeal.

III.

We next turn to the contention by Cambridge that the bankruptcy court erred in lifting the automatice stay imposed pursuant to Section 362. In reviewing the findings of the bankruptcy judge, this Court shall not set aside those findings unless clearly erroneous. Bankruptcy Rule 8013. In the instant case, the bankruptcy court specifically found that Cambridge had not complied with the terms of the adequate protection agreements Previously fashioned by the parties and the court. Additionally, the bankruptcy court noted that there remained substantial mortgages and encumbrances attached to the property mortgaged to Production Credit.

Section 362(d) provides the following regarding the circumstances under which an

automatice stay may be lifted.

> (d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, anulling, modifying, or conditioning such stay.
>
> (1) for cause, including the lack of adequate protection of an interest in property of such party in interest; or
>
> (2) with respect to a stay of an act against property under subsection (a) of this section, if --
>
> (A) the debtor does not have an equity in such property; and
>
> (B) such property is not necessary to any effective reorganization.

While lack of adequate protection is specificall provided for in Section 362 as one type of cause justifying the lifting of any automatice stay, the language of section 362 does not limit "cause" to lack of protection. In Re Family Investments, Inc., 8 B.R. 572 (Bkrtcy. W.D. Ky. 1981). In this regard, we note that "cause" has been interpreted as the failure of a debtor to comply with the terms of an agreed order

affording adequate protection in the form of payments to a creditor. Id.

In the instant matter, Cambridge failed make periodic payments to Production Credit in compliance with the previous orders of the bankruptcy court as agreed upon by the partie Finding especially significant the above in- action by Cambridge, we agree with the distri court's conclusion the the "[o]rder [lifting the stay] was reasonable in lieu of the mortg and encumbrances on the subject property, the length of time which [Cambridge] had been in Chapter 11, and [Cambridge's] failure to comp with the adequate protection agreements which resulted from prior Bankruptcy Court hearings Therefore, we affirm.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 88-3133

IN THE MATTER OF: CAMBRIDGE PROPERTIES, INC.

Debtor

CAMBRIDGE PROPERTIES, INC.,

Appellant

=versus=

BATON ROUGE PRODUCTION CREDIT ASSOCIATION,

Appellee.

Appeal from the United States District Court
for the Eastern District of Louoisiana

ON PETITION FOR REHEARING AND
SUGGESTION OF REHEARING EN BANC

(Opinion: September 25, 1988, 3 Cir., 1988, ___ F.2d _____)

(November 1, 1988)

Before CLARK, Chief Judge, and JOHNSON and JOLLY Circuit Judges.

PER CURIAM"

The Petition For Rehearing is DENIED and no member of this panel nor Judge in regular service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

IN RE:
CAMBRIDGE PROPERTIES, INC.
Bankruptcy No. 85-02098K

Debtor

CIVIL ACTION

NO. 87-4154

SECTION: E/4

ORDER AND REASONS

Appellant, Cambridge Properties, Inc., has appealed froman order of the Bankruptcy Court granting Baton Rouge Production Credit Association's motion to lift stay imposed by 11 U.S.C. Section 362. In addition, Appellee, Baton Rouge Production Credit Association, has moved to dismiss Appellant's appeal. The Appellee alleges that Appellant, Cambridge Properties, Inc. failed to file notice of appeal within the requiste ten day period pursuant to Bankruptcy Rule 8002(a). This Court has jurisdiction pursuant to 28 U.S.C. Section 158 and Sectin 1334 and Bankruptcyy Rule 8001.

FACTUAL BACKGROUND

On or about January 13, 1983, Geoffrey and Sara Longenecker executed a collateral mortgage note made to Baton Rouge Production Credit Association (hereinaffter "Secured Creditor") in the amount of $500,000.00. This note was secured by an act of collateral mortgage on immovable property. Thereafter, Geoffrey and Sara Longenecker transferred the ownership of this property to Cambridge Properties, Inc. (hereinafter "Debtor").

On August 19, 1985, Debtor filed a petition for relief under Chapter 11 of the Bankruptcy Code. On November 21, 1985, the Secured Creditor filed a motion to lift the automatic stay imposed by 11 U.S.C. Section 362. On July 31, 1986, Bankruptcy Court entered an order lifting

the stay upon presentation of an application and order lifting the stay which set forth violations of the adequate protection agreement.

On or before September 22, 1986, a joint plan of settlement and compromise was entered which included an agreement that $5,000.00 per month, commencing September 22, 1986, would serve as adequate portection for the Secured Creditor. Payment was to commence on September 22, 1986. The Secured Creditor received payment on September 26, 1986 but did not receive further payment until May 20, 1987, when the parties agreed that the Debtor would commence payment and continue to make payments on the 20th day of each month. The Debtor's failure to make payment in compliance with these agreements and the number of outstanding

mortgages Debtor has on this properrty and other properties owned by Cambridge Properties, Inc. resulted in the Bankruptcy Court's order to lift the automatic stay imposed by 11 U.S.C. Section 362 and permitted the institution of foreclosure proceedings on this property by the Secured Creditor.

The Debtor has appealed the order of the Bankruptcy Court. The Secured Creditor has filed a motion to dismiss the debtor's appeal as untimely, for the notice of appeal was not filed within ten days of July 31, 1987 which is the requisite time allowed under Bankruptcy Rule 8002(a).

ANALYSIS

Judge Kingsmill in his order to lift stay found that the debtor had not complied with the terms of either of the

adequate protection agreements. In addition, the Court noted that there remained substantial additional mortgages and encumbrances attached to the property mortgaged by the Secured Creditor. The Bankruptcy Court concluded that automatic stay imposed by section 362 of the Bankruptcy Code be lifted in so far as Baton Rouge Credit Association was concerned.

The standard by which a Bankruptcy Court's Order should be reversed is set out in Bankruptcy Rule 8013 which provides:

> "On appeal tghe district court or bankruptcy appellate panel may affirm, modify, or reverse a bankruptcy court judgment, order or decree or remand with instructions for further proceedings.

> Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the Bankruptcy Court to judge the credibility of witnesses."

The Advisory Committe Note concludes that Rule 8013 accords to the findings of a Bankruptcy Judge the same weight given to the findings of a District Judge under Federal Rule of Civil Procedure 52, which states in pertinent part:

> "Findings of fact shall no be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.

"It shall be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the Court. Findings of fact and conclusions of law are unnecessry on decisions of motions rule 12 or 56 or any other motion except as provided in Rule 41(b)."

Thereby the standard of "clearly erroneous" must be applied in determining whether the trial court's findings of fact constitute any reversible errors.

Debtor argues that in Wright v. Union Central Life Ins. Co., 311 U.S. 273 (U.S. 1940) the Supreme Court held that so

long as a creditor's rights as to value of his collateral were protected, the creditor was not in a position to insist that doubts and ambiguities in the law be resolved in his favor. In the matter at hand, however, the Bankruptcy court ordered that the creditor's rights as to the value of his collateral were not adequately protected. This issue is factually based. The District Court may only reverse this Order should the Debtor prove that the Bankruptcy Court was "clearly erroneous" in its order. The Debtor has not sustained its burden. The Order given was reasonable in lieu of the mortgages and encumberances on the subject property, the length of time which the Debtor had been in Chapter 11, and the Debtor's failure to comply with the adequate protection agreements which

resulted from prior Bankruptcy Court hearings.

Moreover, Debtor's notice of appeal was not filed within the requisite ten days of the date of the entry of the Order as provided in Bankruptcy Rule 8002(a). In addtion, Debtor did not file a request to extend the time for filing a notice of appeal within the ten day period prescribed by Bankruptcy Rule 8002(c).

Accordingly, IT IS ORDERED that the Bankruptcy Court's order lifting the automatic stay imposed by 11 U.S.C. Section 362 of the Bankruptcy Code in so far as Baton Rouge Production Credit Association be AFFIRMED.

New Orleans, Louisiana, January 12, 1988.

s/Marcel Livaudais, Jr.

MARCEL LIVAUDAIS, JR.

United States District Judge

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF LOUISIANA

IN RE:	CASE NO.
CAMBRIDGE PROPERTIES, INC.	85-02098K
DEBTOR	CHAPTER 11

ORDER

This matter having come on for hearing on June 20, 1987 on the motion to lift stay filed by Baton Rouge Production Credit Association.

There were present:

Merrill T. Landwehr, Counsel of Baton Rouge Production Credit Association

Geoffrey H. Longenecker, counsel for Cambridge Properties, Inc.

The Court after hearing the arguments of counsel, ascertained the following from the record in this proceeding:

1. The Motion to Lift Stay was originall filed on November 21, 1985, and, after initial being continued, was heard by this court on February 18, 1986.

2. Thereafter, after additional hearings and Order was entered by this Court on July

31, 1986 providing that the stay imposed unc Section 362 of the Bankruptcy Code shall imm diately be lifted, upon presentation to this Court of an Application and Order for the li ing of such stay, setting forth the violatio or violations of the conditions of adequate protection spelled out in such Order, which included the following:

A. On or before September 22, 1986, Cambridge Properties, Inc. shall negotiate w Baton Rouge Production Credit Association th form of additional adequate protection to be furnished Baton Rouge Production Credit Asso ciation after September 22, 1986;

B. On or before September 22, 1986, Ce Savings & Loan Association and Cambridge Pr perties, Inc. shall either have perfected a dation en paiement or foreclosure of the pr owned by Cambridge Properties, Inc. known a Harbor View Property, which shall result in and all mortgages held by Central Savings & Loan Association being released insofar as property mortgaged to Baton Rouge Productio Credit Association is concerned; and

C. On or before September 22, 1986, Cambridge Properties, Inc. shall deliver to Baton Rouge Production Credit Association sufficient evidence that the only mortgages liens, and encumbrances affecting the prope mortgaged to Baton Rouge Production Credit Association consists of the mortgage in fav

of Baton Rouge Production Credit Association and the mortgage in favor of the Whitney National Bank.

3. On or beofre September 22, 1986, it was agreed that $5,000.00 per month, commencin September 22, 1986, would serve as adequate protection for Baton Rouge Production Credit Association. Since that date a payment in the amount of $5,000.00 was received on September 26, 1986, and no further payments have been made.

4. It was agreed that the $5,000.00 per month monthly payments would be resumed commencing May 20, 1987 and on the 20th day of each month thereafter, failing which the automatic stay would be automatically lifted. Monthly payments were made on May 20, 1987 and June 20, 1987, however, the monthly payment due for July 20, 1987 has not been paid.

5. Additionally, Central Savings & Loan Association and Cambridge Properties, Inc. ha neither perfected a dation en paiement or com

pleted a foreclosure of the property owned by Cambridge Properties, Inc. known as the Harbo View property.

6. Furthermore, there remain substantia additional mortgages and encumbrances affecti the property mortgaged to Baton Rouge Product Credit Association in addition to its mortgag and the mortgage in favor of the Whitney National Bank of New Orleans; therefore, it is

ORDERED that the automatic stay imposed by Section 362 of the Bankruptcy Code insofar as Baton Rouge Production Credit Association concerned, be, and is hereby, lifted so as to permit the institution of foreclosure proceedings against such property by Baton Rouge Production Credit Association.

New Orleans, Louisiana, this 31st day of July, 1987.

T.H. KINGSMILL, JR.
BANKRUPTCY JUDGE